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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS DOMINGUEZ,

Defendant and Appellant.

E049951

(Super.Ct.No. SWF005981)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Mark A. Mandio, Judge.

Affirmed with directions.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Barry Carlton and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

This appeal follows an earlier appeal and this court's remand for resentencing. (*People v. Dominguez* (July 15, 2009, E045944) [nonpub. opn.].) Defendant Jose Luis Dominguez was originally sentenced to 24 years 4 months in prison for several offenses he committed on October 25 and November 10, 2003. On remand, the court imposed the same aggregate sentence of 24 years 4 months, but on different grounds.

On this appeal, defendant claims his new sentence must be reduced by two years because a four-year subordinate term was imposed on count 2 when, as a matter of law, only a two-year subordinate term was allowable on count 2. The People agree with defendant's calculation of the maximum allowable term on count 2 but argue that, rather than reducing defendant's sentence by two years, the matter must again be remanded for resentencing because the trial court may in its discretion impose the same 24-year 4-month sentence by other, alternative means. We agree with the People. Thus, we again remand the matter for resentencing.

II. BACKGROUND

As set forth in our prior opinion, defendant was convicted following a jury trial of several offenses including, but not limited to, the attempted voluntary manslaughter of Miguel Lara in count 2 (Pen. Code, §§ 192, 664),¹ assaulting Lara with a semiautomatic firearm in count 6, and assaulting a second victim, Sandra Gomez Ulloa (Sandra), with a semiautomatic firearm in count 5 (§ 245, subd. (b)). The jury found true a great bodily

¹ All further statutory references are to the Penal Code unless otherwise indicated.

injury enhancement in count 5 and personal use enhancements in counts 2, 5, and 6.

Defendant admitted a 2002 prior strike conviction for making criminal threats against his ex-wife. (§ 422.)²

Defendant's original 24-year 4-month sentence consisted of 19 years on count 5, the principal count, plus a consecutive term of five years four months on count 6.³ In our prior opinion, we affirmed the judgment, but remanded the matter for resentencing with directions to consider (1) striking defendant's prior strike conviction in the interests of justice (§ 1385; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) and (2) imposing concurrent rather than consecutive terms on counts 5 and 6.

At resentencing, the court declined to strike the prior strike conviction but again sentenced defendant to 24 years 4 months in prison, though on different grounds. Instead of imposing a consecutive term on count 6, the court stayed sentence on that count and imposed a consecutive five-year four-month term on count 2, consisting of two years,

² Defendant was further convicted of being a felon in possession of a firearm (count 7), being under the influence of a controlled substance while armed with a loaded firearm (count 8), and possession of methamphetamine (count 10). Defendant was charged with possession of methamphetamine for sale in count 9, but a mistrial was declared on that count after the jury was unable to reach a verdict on it.

In counts 1, 3, and 4, defendant was charged with the premeditated attempted murder of Sandra (count 1), attempted aggravated mayhem on Lara (count 3), and mayhem upon Sandra (count 4). The trial court dismissed these counts based on insufficient evidence. (§ 1118.1.) Thus, personal discharge and great bodily injury allegations in counts 1 and 4 never reached the jury.

³ The judge who originally sentenced defendant, the Honorable Rodney L. Walker, had retired at the time of resentencing and another judge, the Honorable Mark A. Mandio, conducted the resentencing hearing.

doubled to four years for the prior strike conviction, plus 16 months for the personal use enhancement on count 2.

III. DISCUSSION

Defendant claims, and we agree, that two rather than four years was the maximum allowable subordinate term that could have lawfully been imposed on his conviction for *attempted* voluntary manslaughter in count 2. As defendant points out, only one-third of the middle term may be imposed on a subordinate count. (§ 1170.1, subd. (a) [subordinate term imposed for each consecutive offense shall consist of one-third the middle term prescribed for the offense].) And though voluntary manslaughter is punishable by 3, 6, or 11 years in prison (§ 193), the punishment for an *attempt* to commit an offense punishable by a state prison term shall be one-half the term prescribed for the completed offense (§ 664, subd. (a)). Finally, a subordinate term must be doubled when, as here, the defendant has a prior strike conviction. (§ 667, subd. (e)(1); *People v. Nguyen* (1999) 21 Cal.4th 197, 200-207.) Thus, two years, calculated as one-third the middle term of three years doubled to two years for the prior strike conviction, was the maximum allowable subordinate term that could have lawfully been imposed on count 2.⁴

As noted, the People agree with these calculations but disagree with defendant's preferred remedy. They argue that, rather than reduce defendant's subordinate term on count 2 from four to two years as defendant requests, the matter must again be remanded

⁴ It appears the *attempt* factor was the source of the sentencing error on count 2.

for resentencing. We agree. As the People point out, when part of an aggregate sentence is struck down on appeal, the sentencing court is entitled to reconsider the entire sentence on remand. (*People v. Kelly* (1999) 72 Cal.App.4th 842, 844-845.) This is so “because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components.” (*People v. Hill* (1986) 185 Cal.App.3d 831, 834.)

Thus, on further remand the court may revise defendant’s sentence in a way that corrects the two-year error on count 2 and preserves, but does not exceed, the 24-year 4-month length of the original aggregate sentence. (*People v. Kelly, supra*, 72 Cal.App.4th at p. 845.) On the first remand, the court imposed concurrent four-year terms on counts 7, 8, and 10, consisting of two years on each count, doubled to four years for the prior strike conviction. Each of these counts has a sentencing range of 16 months, 2 years, and 3 years. (§ 18.) If on further remand consecutive, subordinate terms of eight months (one-third the middle term of two years) are imposed on each of these counts, it would total two years. We express no opinion, however, on how the court should exercise its sentencing discretion on remand.

We note that on the first remand the court and counsel were under the mistaken impression that Judge Walker, the judge who originally sentenced defendant,⁵ had run count 2, rather than count 6, consecutive to count 5. But as indicated in our prior opinion on page 17 at footnote 11, the original sentencing minute order and abstract of judgment *incorrectly* showed that defendant had been sentenced to a consecutive term on count 2

⁵ See footnote 3, *ante*.

rather than on count 6.⁶ We did not order these documents corrected because we were remanding the matter for resentencing. Further, though it appeared from Judge Walker’s oral pronouncement of sentence that he was imposing a consecutive term of five years four months on count 2, rather than on count 6, he actually imposed a five-year four-month term on count 6, “the other [section] 245[, subdivision] (b).”⁷

Moreover, on the first remand the court indicated it intended to sentence defendant to the same terms Judge Walker originally imposed, which the court believed was a consecutive five-year four-month term on count 2 (the subordinate term plus 16 months for the personal use enhancement on count 2), rather than on count 6. The court also said that, though it could have imposed a five-year four-month term on count 6, the result was the same so it was going to “stick with the sentencing scheme that Judge Walker imposed.”

For the reasons explained, however, the result is not the same. Only a three-year four-month term (including 16 months for the personal use enhancement) may lawfully be imposed on count 2, whereas a four-year five-month term may lawfully be imposed on count 6 (two years, or one-third the midterm of six years, doubled to four years, plus 16 months for the personal use enhancement on count 6). Should the court on further

⁶ To be sure, one of the principal contentions on the prior appeal was that the matter had to be remanded for resentencing in order for the court to consider whether to impose concurrent rather than consecutive terms on counts 5 and 6.

⁷ Judicial notice is hereby taken of the record in the prior appeal. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

remand determine that count 6 rather than count 2 should be run consecutive to count 5, the court should be mindful that separate or concurrent punishment may not be imposed on counts 2 and 6 because both counts involved the same victim, Lara, and the same course of conduct on the part of defendant. (§ 654.)

IV. DISPOSITION

The matter is remanded for resentencing consistent with the views expressed in this opinion. In all other respects, the judgment is affirmed.

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/s/ King
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Richli
J.